

South Africa: Constitutional Fault Lines, Courts and the ICCPR

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1. Fault lines

- In 1994 the Constituent Assembly commenced a multi-party process to draft a constitution to replace the 1993 interim constitution.
- By March 1996, the Management Committee had identified 68 outstanding issues and five issues where there was deadlock: "death penalty, lockout clauses, education, appointment of judges and the Attorney-General".
- In the final few days of negotiations in May 1996, the key issues that almost derailed the process were related to the Bill of Rights and principally concerned issues under the ICCPR:
 - (1) **lockout clauses**, which was opposed by unions and was causing strikes;
 - (2) **death penalty** which was included in criminal law legislation;
 - (3) right to have **monolingual schools**, championed by Afrikaans dominated parties;
 - (4) inclusion of **right to property**, championed by business; and (resolved a month earlier);
 - (5) whether **customary law** should be subject to the Bill of Rights, opposed by traditional authorities and IKP

2. Ratification of ICCPR (and CEDAW)

Treaty	Signature	Ratify/ Accede
ICCPR	03.10.1994	10.10.1998
ICCPR-OP1		28.08.2002
ICCPR-OP2		28.08.2002
CEDAW	29.01.1993	15.12.1995
CEDAW OP		18.10.2005

3. Impact of ICCPR in South Africa

- Bill of Rights reflects much of ICCPR but treaty only *signed* at the time. (Similar with ICESCR, signed 1994 but not ratified)
- In invitation to submit proposals on rights for new constitution, no reference to international treaties. Although international-aware lawyers involved in drafting.

- References in Constitutional Court Judgments:

No. of Judgments	ICCPR	ICESCR	CEDAW
359	130	49	20

- ICCPR to OP used only once. Lost by applicant: the banning of cannabis was found reasonable even though it interfered with freedom of Rastafarian religion (*Prince v South Africa*, 2007).

Two Hypotheses: ICCPR as Accessory and Frame

1. ICCPR is an '**accessory**' in South Africa since (i) much of ICCPR constitutionally incorporated and (ii) a strong Constitutional Court reduces need to appeal to HRC.* But may change if new judicial appointments more executive-friendly.

2. ICCPR may help **frame** litigation, advocacy strategies and government policy where there is constitutional ambiguity.

Passing note on nonlinearity: Existence rather than ratification of international human rights treaties currently seems more important for South Africa.

* Compare with Australia: *Toonen*, *Young* cases.

Research proposal

1. Investigate the original **fault lines**, how they were resolved by **courts** and to what extent the **ICCPR** (and CEDAW) were relevant.

2. The following table analyses four of the five issues on the basis that they have attracted litigation and the ICCPR has been invoked. In the case of customary law, CEDAW has been relevant.

3. South African experts on each area would be brought in to analyse impact and influence of ICCPR **and** shed light on the national implementation of key ICCPR provisions.

4. By analysing the courts' role, the role of judicial implementation will also be highlighted as these cases have addressed contentious issues.

	Cases	Socio-legal-political
1. Death penalty	<i>State v Makwanyane</i> (1995)	a. Court found death penalty cruel and degrading b. Majority support for death penalty and hints of support from President Zuma c. SA ratified Second OP to ICCPR in 2002 which would restrain them from executions or changing constitution
2. Monolingual schools	<i>Ex Parte Gauteng</i> (1996), <i>Mikro</i> (2005)	a. Constitutional compromise means contextual assessments b. Many local conflicts over exclusion of English-speaking black children from Afrikaans schools and litigation at High Court.
3. Customary law	<i>Bhe v. Khayelitsha</i> (2004)	a. Customary law must develop with rights says Court b. Other cases and conflicts over Communal Land Bill
4. Right to property	<i>Foresti v South Africa</i> (ICSID Arbitration) (current)	a. Right to property subject to redressing effects of apartheid b. Minerals legislation contested by some mining companies

Thank you

